90-228

(1)

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

PAUL R. COUTURE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits a brief investigative stop where police have reliable information that a suspect is carrying a handgun late at night in a convenience store and on public roadways.

OPINION BELOW

The opinion of the court below (App. A) is reported at 407 Mass. 178, ___ N.E.2d ___ (1990).

JURISDICTION

The decision of the court below denying a petition for rehearing was on May 3, 1990. (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On February 12, 1988, a complaint was sworn to in the Lowell Division of the District Court Department of the Commonwealth of Massachusetts against respondent Paul R. Couture for the unlawful possession of a firearm without a license. Mass. Gen. Laws c. 269, §10(a). After bench trial, Couture appealed to the jury session, and filed a pretrial motion to suppress evidence, i.e. the handgun seized from his vehicle. The trial court allowed the motion to suppress and issued findings and rulings. (App. C). The Commonwealth took an interlocutory appeal.

The Supreme Judicial Court affirmed the order of the district court. The court first held that because in

Massachusetts it is legal to possess a firearm if one has a license, and the police only knew that "a man had been seen in public with a handgun. . . . this unadorned fact, without any additional information suggesting criminal activity, does not give rise to probable cause. . . to believe that the individual is illegally carrying that gun." Commonwealth v. Couture, 407 Mass. at 180-181 (1990).[1/]

More significantly, for purposes of this petition the court also held that

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1/ The court relied on Commonwealth v. Toole, 389 Mass. 159, 448 N.E.2d 1264 (1983) for its holding that "the ownership or possession of a handgun . . . is not a crime and standing alone creates no probable cause." Couture, 407 Mass. at 179-181. Toole, 389 Mass. at 163, 448 N.E.2d at 1268, however, is based entirely on Commonwealth v. Moon, 380 Mass. 751, 759-760, 405 N.E.2d 947, 953 (1980) and Moon, in turn, relied exclusively on federal constitutional law citing the Fourth Amendment, Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221-222 (1968) and Cardwell v. Lewis, 417 U.S. 583, 592 (1974).

> the Commonwealth is incorrect in its claim that the stop and subsequent search of the vehicle was justified under the principles of Terry v. Ohio, 392 U.S. 1 (1968). There is no question that the stop of the pickup truck constituted a seizure within the meaning of the Fourth Amendment to the United States Constitution. See United States v. Cortez, 449 U.S. 411, 417 (1981); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, supra. As we discussed above, there is absolutely no indication that the defendant in this case was engaged in criminal activity. The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles.

Commonwealth v. Couture, 407 Mass. at 183.

The Commonwealth petitioned for rehearing, which was denied on May 3, 1990.

STATEMENT OF FACTS

On February 11, 1988, at approximately 11:35 p.m., Officers Gary Richardson and Steven Morril of the Lowell Police Department were patroling the Belvedere section of Lowell, Massachusetts, in a marked police cruiser when they received a radio broadcast. (App. D. pp. 26-27). They were informed that a call had been received from the clerk of the Li'l Peach convenience store on Rogers Street in Lowell. Officer Richardson had been a Lowell police officer for nine years. (App. p. 25-26). The clerk informed the dispatcher that a man inside the store had a small handgun, with white pistol grip protruding from his right rear pocket. (App. p. 27). The clerk said the man had just left the store, entered a green or gray Dodge pick-up truck with a New Hampshire license plate number.

(App. p. 28). The clerk reported the registration number to the police, and the direction in which the truck was travelling. (App. p. 28).

As Officers Richardson and Morril drove towards the convenience store, they received a second radio broadcast from a national park ranger stating that the ranger was following a truck which matched the description and which bore the reported registration number in the Hunt Falls Bridge area of Lowell, MA. (App. p. 29). Officers Richardson and Morril drove towards that area; they spotted the truck, activated the cruiser lights and pursued the truck to Reed Street in the Centerville section of the city, where they pulled it over. (App. pp. 29-30).

Officer Richardson approached the truck with his service revolver out, ordered the respondent, who was alone, to

get out of the truck, and took him to the rear of the cab (halfway to the rear of the truck). (App. pp. 32, 33, 41). He asked him for identification. (App. p. 32). Officer Morril detained the respondent while Officer Richardson searched the front seat area of the truck and found a loaded .38 caliber pistol which was three or four inches under the seat on the driver's side of the transmission hump. (App. pp. 33, 36, 37). The weapon was located in an area to which the driver of the vehicle would "absolutely" have had access. (App. p. 43). The handgun matched the description of the gun seen earlier by the store clerk. (App. p. 33). Officer Richardson examined the handgun and removed the bullets. (App. p. 34). Officer Richardson testified he was not in fear of safety while he was searching the truck. (App. p. 42). He then advised

the defendant of his Miranda rights and asked respondent if he had a license for the gun. (App. pp. 34-35). The respondent replied that he did not and he was placed under arrest for unlawfully carrying a firearm without a license. (App. p. 35).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT THAT THE FOURTH AMENDMENT PROHIBITS A BRIEF INVESTIGATIVE STOP WHERE POLICE HAVE RELIABLE INFORMATION THAT A SUSPECT IS CARRYING A WEAPON IN PUBLIC CONFLICTS WITH DECISIONS OF THIS COURT AND LOWER FEDERAL AND STATE COURTS.

If allowed to stand, the decision of the Supreme Judicial Court will prevent police officers from conducting a stop, pursuant to Terry v. Ohio, 392 U.S. 1 (1968), to search for a handgun or to ask a suspect whether he has a license to carry a handgun even though the police are informed that the suspect is

carrying a handgun late at night in a convenience store and on public roadways.[2/]

A. The Decision Below Conflicts With Decisions Of This Court.

Couture is wrong as a matter of federal constitutional law upon which it is based; it is directly contrary to Terry v. Ohio, 392 U.S. 1 (1968), Adams v. Williams, 407 U.S. 143 (1972) and their progeny. In Terry, this Court held for the first time that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no

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2/ It is also submitted that, while as argued infra, reasonable suspicion is sufficient to justify the stop and search, there was also sufficient information to provide probable cause to believe that respondent was carrying an unlicensed firearm. This petition only addresses the reasonable suspicion argument.

probable cause to make an arrest" and that if he reasonably concludes "in light of his experience that criminal activity may be afoot and that persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others . . . to conduct a carefully limited search" for concealed weapons. Terry, 392 U.S. at 22. The purpose of the stop is to conduct a brief investigation that would quickly confirm or dispel suspicion that criminal activity was afoot. United States v. Sokolow, ___ U.S. ___, 109 S.Ct. 1581, 1587 (1989); United States v. Place, 462 U.S. 696 at 702, 703 (1983); Terry, 392 U.S. at 30; United States v. Cortez, 449 U.S. 411 at 417-419. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that

intrusion." Terry, 392 U.S. at 21. A determination of the reasonableness of the seizure and search involves a dual inquiry "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20. Moreover, this Court has repeatedly stressed that in evaluating the validity of the initial stop, it is the totality of the circumstances -- the whole picture confronting the police officer. United States v. Sokolow, at 1585.

The touchstone of the analysis under the Fourth Amendment is always "the reasonableness in all the circumstances." Terry, 392 U.S. at 19, 22; Pennsylvania v. Mimms, 434 U.S. 106, 108-109 (1977); United States v. Place, 462 U.S. at 702-703, 706. In turn,

reasonableness of both the initial stop and subsequent search depends on balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." Id. at 703; Terry, 392 U.S. at 22.

The stop and pat down of the suspect in Terry was held reasonable under the Fourth Amendment when the interest of privacy of the suspect was weighed against the important government interests of crime detection and prevention, id. at 22, and the need for law enforcement officers to conduct a

limited search for weapons to protect themselves and other prospective victims of violence while they are conducting the investigation. Id. at 24. In Adams v. Williams, 407 U.S. 143 (1972), this Court applied Terry principles to hold that, where a known informant told a police officer that an individual was sitting in a particular car and was carrying narcotics and a gun at his waist, a police officer was justified in reaching into the car and seizing the weapon from Williams's waist. Id. at 146-147. The court held that the officer was, in the first instance, "properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high crime area at 2:15 a.m." Id.

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his

> shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Id. at 145-146.

Most importantly, this Court held that finding the gun precisely where the informant said it would be provided "probable cause to arrest Williams for unlawful possession of the weapon." Id. at 148; (emphasis added). Moreover, in so holding the Court "expressly rejected the view that the validity of a Terry search depends on whether the weapon is possessed in accordance with state law." Michigan v. Long, 463 U.S. 1032, 1052 n.16 citing Adams v. Williams, 407 U.S. at 146. Indeed, in this regard it is

important to note that in Adams, the dissent strongly argued that the initial stop was improper because under Connecticut law it was permissible to possess a gun if one had a license. Id. at 158-159 n.7. (Marshall, J. dissenting).

The information was deemed reliable simply because the officer knew the informant, who came forward personally and the police officer immediately verified the information at the scene. Adams, 407 U.S. at 148. See also Alabama v. White, ___ U.S. ___, 110 S.Ct. 2412 (1990) (anonymous tip provided reasonable suspicion for initial stop where caller provided name of woman, description of automobile, her destination and that she would be carrying an ounce of cocaine and police verified information at scene). The information therefore provided reasonable suspicion to believe that the

suspect was armed and potentially dangerous to the officer or others, and entitled him to "pursue his investigation without fear of violence, . . . whether or not carrying a concealed weapon violated any applicable state law." 407 U.S. at 146. If the informant's unverified tip in Adams that the suspect was carrying a gun and narcotics was enough to justify a Terry stop, and the seizing of the gun from the suspect's waist was sufficient to provide probable cause that the weapon was unlicensed, then surely the information in the instant case provided reasonable suspicion for the initial stop.[3/] (discussed infra).

3/ As noted supra, although a finding of reasonable suspicion is dispositive of this case, it is submitted the information was sufficient to provide probable cause that the weapon was unlicensed.

In Terry, Adams v. Williams, 402 U.S. 143 and Michigan v. Long, 463 U.S. 1032 (1983) it was the reasonable suspicion that the suspects were armed and that they might be dangerous, combined with the importance of the related governmental interests in protecting the public and the police and in detecting and preventing crime were the most significant factors justifying a Terry stop and search for weapons.[4/]

4/ See also, United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (strong governmental interest in keeping illegal aliens out of country allows brief investigative stop near border for questioning about citizenship and immigration status); United States v. Place, 462 U.S. 696 (1983) (strong governmental interest in stopping drug courier activity at airports allows police to make brief investigative stops of persons and their baggage at airport on reasonable suspicion of drug trafficking because it substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels).

> We think it too plain for argument that the State's proffered justification -- the safety of the officer -- is both legitimate and weighty. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Terry v. Ohio, supra at 23. And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. "According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings - A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963)." Adams v. Williams, 407 U.S. 143, 148 n.3 (1972).

Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (per curiam) (given risk to officer, proper to order minor traffic offender out of vehicle even though no foul play suspected at time of stop); Michigan v. Long, 463 U.S. at 1047; Adams v. Williams, 407 U.S. at 148 n.3. It should also be "too plain for argument"

that the same governmental interest here is compelling -- i.e., protecting the public from inherently dangerous instrumentalities such as firearms and to that end investigating the carrying of them in public and whether those who are doing so have a license. "The context of a particular law enforcement practice . . . affect[s] a determination of whether a brief instrusion on Fourth Amendment interests on less than probable cause is essential to effective criminal investigation. United States v. Place, 462 U.S. at 704. The "context" here is the inherent dangerousness of firearms and Massachusetts law aimed at reducing that danger.

Current statistics of firearm violence suggest that it has reached epic proportions. See Turley and Rooks, Firearms Litigation Law, Science and

Practice, Vol. 1, p. 13 (1988). "[T]he hard figures which have been collected annually for decades by law enforcement agencies, safety professionals, and the medical profession show that the problem is great -- some would say, staggering . . ." Id. at 5. "There may be 30 to 50 million handguns in private hands and 2.5 million more are being manufactured annually." "A new handgun is now sold every 13 seconds, a handgun-related injury occurs every two and one-half minutes and a death results every 20 minutes." Id. at 10, 11. F.B.I. statistics for the year 1988 reveal that in the case of homicides approximately 11,084 involved the use of a gun. "Of the total number of murders reported in 1988, 45% were by handgun, 6% by shotgun, 4% by rifle and 5% by another or unknown type of firearm." Hogan, H.,

Congressional Record Service Issue Brief, Gun Control, The Library of Congress, No. IB890093 p. 7 (April 3, 1980). A study by the Bureau of Justice Statistics in 1986 revealed that "during the 10-year period 1973-1982, . . . half of all robberies, a third of all assaults, and a fourth of all rapes were committed by armed offenders. Of these armed offenders, 35% involved a gun." Id. "The easy availability of firearms to potential criminals . . . is well known . . . [and] is relevant to an assessment of the need for some form of self-protective search power." Terry, 392 U.S. at 24 n.21.

In light of the potential danger created by the unlawful carrying of firearms, the inherent dangerousness of firearms, and the significant role that firearms play in crime, Massachusetts has adopted a restrictive statutory scheme

and "harsh inflexible penalties . . . needed to serve as a deterrent. . . ." Deterrence is the primary objective of the statute. Commonwealth v. Jackson, 369 Mass. 904, 911, 919, 314 N.E.2d 166, 171, 176 (1976); Commonwealth v. Lindsey, 396 Mass. 840, 842-843, 489 N.E.2d 666 (1986). Mass. Gen. Laws c. 269, §10 mandates a one-year mandatory minimum jail sentence for any person who carries under his control in a vehicle a firearm, loaded or unloaded without having in effect a valid license.[5/] Most

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5/ Under Massachusetts law, a non-resident who wishes to carry a handgun while traveling through the Commonwealth must have a Massachusetts license pursuant to Mass. Gen. Laws, c. 140, §131 (one who has a place of business in the Commonwealth may apply for a license) or he must have a temporary license under the exemptions provided by §131F (temporary license for one year) or §131G, (e.g. pistol or revolver competition), neither of which apply here. Commonwealth v. Landry, 6 Mass. App. Ct. 404, 405, 376 N.E.2d 1243 (1978).

importantly, G.L. c. 140, §129C allows a police officer to demand the production of any person's gun license so long as that person is not on his own property:

> Any person who, while not being within the limits of his own property or residence, . . . and who is not exempt under this section, shall on demand of a police officer or other law enforcement officer, exhibit his license to carry firearms . . . Upon failure to do so, such person may be required to surrender to such officer said firearm, rifle or shotgun which shall be taken into custody. Id.

"Against [the] strong governmental interest, . . . must [be] weigh[ed] the nature and extent of the intrusion upon the individual's Fourth Amendment rights where police briefly detain [him] for limited investigative purposes." United States v. Place, 462 U.S. 696, 705 (1983). The Amendment does not protect

the merely subjective expectation of privacy but only "those expectations that society is prepared to recognize as 'reasonable.' Oliver v. United States, ___ U.S. ___, 104 S.Ct. 1735 (1984) quoting Katz v. United States, 389 U.S. 347, 360 (1976). In New York v. Class, 475 U.S. 106, 114-115 (1986), this Court held that because of the important role played by the vehicle identification number in the pervasive governmental regulation of the automobile and efforts by government to ensure VIN is placed in plain view, there was no reasonable expectation of privacy in the VIN." "[A] demand to inspect the VIN, like a demand to see license and registration papers is within scope of police authority pursuant to a traffic violation stop."

There is a diminished, if not total lack of legitimate expectation of privacy

here because of: the inherently dangerousness of firearms; the pervasive regulation of firearms; the statute entitling a police officer to demand a license; and the manner in which the firearm was displayed in a public store.

1. The Initial Stop

Applying the principles of Terry and Adams to the facts of this case, it is clear that the "reasonableness in all the circumstances," Long, 463 U.S. at 1032, demonstrated that the initial stop here was justified.

It was at the late hour of 11:30 p.m. when the police received a radio transmission that a clerk in the Li'l Peach convenience store on Rogers Street in Lowell, MA. had telephoned to alert police as to the unusual circumstance of seeing a patron walking around the store

with a handgun, a derringer, protruding from his back pocket. See Michigan v. Long, 463 U.S. at 1050 (the hour was late and the area rural). The clerk gave the police a detailed description of the gun, a description of the color and make of the pickup truck, and the exact New Hampshire license plate. He also provided them with the direction in which the truck was travelling. Even absent explicit expression of fear by the clerk or any statement of opinion that the person in the store was "casing it" to rob it, it would seem obvious from the information the clerk provided (and the fact that he called the police to provide it) that he was in fear, had some grave concern as to the patron's behavior, or that he as a citizen believed there was the potential for criminal activity. Terry, 392 U.S. at 30. The reliability

of this tip as part of the basis upon which the police officers formed a reasonable suspicion that criminal activity was afoot is unquestionable and indeed the stop was not challenged on that basis. Adams v. Williams, 407 U.S. at 146-148; Alabama v. White, 110 S.Ct. at 2416-2417. In any event, "[t]his is a stronger case than obtains in the case of an anonymous telephone tip." Adams, 407 U.S. at 146. It was called in by a named citizen working late at night at a familiar business establishment within the officer's jurisdiction, and the information he gave was immediately verified at the scene. Adams, 407 U.S. at 146; Alabama v. White, 110 S.Ct. at 2416-2417.

The facts that the event occurred at 11:30 p.m. in a convenience store in a

large metropolitan area,[6/] and that the officer had been a member of the Lowell Police Department with nine years' experience also support a finding of reasonable suspicion. Terry, 392 U.S. at 23. In all situations the officer involved is entitled to assess the facts in light of his experience in detecting crime. Id. United States v. Brignoni-Ponce, 422 U.S. at 884-885 (officers may consider the characteristics of the area, behavior of

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6/ The population of Lowell, MA was estimated at 94,070 in 1988. Bureau of the Census, U.S. Dep't of Commerce, No. 88-NE-SE, Current Population Reports, p.18 (1988). The 1987 F.B.I. Uniform Crime Reports show that in 1987 cities of the size of Lowell, robberies of commercial and financial establishments accounted for 23% of the robberies. In the Northeastern states firearms were used in 25% of the robberies. See Federal Bureau of Investigation, Uniform Crime Reports for the United States - 1987, at 18. In 1988 convenience store robberies showed the greatest increase, 16%. Id., 1988 Crime Reports at 19.

suspect). Moreover, Officer Richardson testified that after he activated the cruiser lights he "pursued" the truck from the Hunt Falls Bridge area to Reed Street in the Centerville section. That respondent did not immediately pull over was also a factor which could fairly heighten a seasoned officer's suspicion.

In addition, the facts that the object of the search was an inherently dangerous weapon and that the area to be searched was a moving vehicle contribute to a finding of reasonableness -- because the stop here "was imbued with a concern for the speedy investigation of suspects using an automobile on public streets, potentially armed with a deadly weapon." Clark v. State, 171 Ind. App. 658, 358 N.E.2d 761, 763 (1977); see California v. Carney, 471 U.S. 386, 390 (1985) (mobility of automobile inherently created exigency). The fact that the

truck had a New Hampshire registration is also relevant to a determination of reasonable suspicion to believe the suspect was carrying an unlicensed firearm. As discussed infra, it is a rational inference that a New Hampshire resident would have been less likely to have obtained a Massachusetts license or fall within one of the limited exemptions of G.L. c. 140, §§131F or 131G.

Reasonable suspicion is a "much less demanding standard than probable cause." Probable cause means "a fair probability that contraband or evidence of a crime will be found." Alabama v. White, 110 S.Ct. at 2416. Reasonable suspicion can be established with information that is even "less reliable than that required to show probable cause." Id. See United States v. Place, 462 U.S. 696 (1983) (reasonable suspicion that Place was trafficking in narcotics based on fact

that although Place complied with request to examine his airline ticket and identification, there were different addresses on his bags and neither address existed); see United States v. Sokolow, 109 S.Ct. at 1581. Police officers are entitled to "formulate[ ] certain common sense conclusions about human behavior." Id. at 1585 quoting United States v. Cortez, 449 U.S. 411, 418 (1981).

In making a determination of reasonable suspicion for an investigative stop, the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts. Id. at 1587. "It would have been poor police work indeed" for the officers not to have investigated this call, Terry, 392 U.S. at 23, particularly in light of the fact that Mass. Gen. Laws c. 140, §129C, explicitly entitles a police

officer to demand a license to carry firearms from someone on public roadways.

2. The Scope of the Search and Seizure Was Proper.

The search of the truck was strictly tied to, and justified by, the circumstances which rendered its initiation permissible. Terry, 392 U.S. at 19; Michigan v. Long, 463 U.S. at 1049-1050. It was based on reasonable grounds to believe the suspect was armed and possibly dangerous and was proportioned in scope. Terry, 392 U.S. at 28-30. The search was limited to those areas in the vehicle to which the suspect would generally have had access. Michigan v. Long, 463 U.S. 1032, 1049 (1983). In fact, Officer Richardson testified it was found where the driver "absolutely" had access.

In Michigan v. Long, 463 U.S. at 1049, Long was still deemed to have

"access" notwithstanding the fact that he was alone, dazed and at the rear of the car under the custody of two armed police officers, because the possibility existed that the suspect "might break away from police control and retrieve a weapon from his automobile." Id. at 1051. Just as important, the Court held, is the interest in protecting the public. The vehicle should be searched for weapons because "if the suspect is not arrested he will be permitted to reenter his automobile and have access to any weapons inside." Id. at 1052.

"The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." Terry, 392 U.S. at 287. In this regard, it was not improper that Officer Richardson approached the vehicle with his revolver drawn. United States v. White, 648 F.2d

29, 36-37 (D.C. Cir.), cert. denied, 454 U.S. 924 (1981), or that he ordered respondent out of the car. Pennsylvania v. Mimms, 434 U.S. at 110. Through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training, the officer acted reasonably in being prepared for possible violence. White, 648 F.2d at 36-37; United States v. Aldridge, 779 F.2d 368 (11th Cir. 1983); United States v. Trullo, 809 F.2d 108, 113 (1st Cir. 1987).

According to the Federal Bureau of Investigation, seventy-six law enforcement officers were killed by firearms in the line of duty in this country in 1988, an increase of five percent over the 1987 total. Federal Bureau of Investigation, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted - 1988, at 3. From 1984 to

1988 13% of the 368 officers slain in that period were murdered during traffic pursuits and stops. Id. at 16.[7] From 1984 to 1988, 39.4% of the officers killed were slain between the hours of 6 p.m. and midnight. Id. at 14. Therefore, Officer Richardson, approaching the truck of a person known to have a gun at the late hour of 11:30 p.m. in a large metropolitan area such as Lowell would be at great risk without drawing his revolver and/or securing the suspect's gun. There is no requirement that the particular officer be in fear. W.R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, Vol. 3 at 504-505 n.22 (2d ed. 1987). The standard is an objective one; whether a

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7/ In addition, a ten year period (1979-1988) indicates that the majority of fatal shootings of officers occur from a distance of five feet or less. Id. at 13.

reasonably prudent person would believe a suspect may be armed and dangerous. Terry, 392 U.S. at 21-22.[8/]

The officer's stop and search was based on reasonable suspicion and the search was proportioned in scope. The Supreme Judicial Court has

> blind[ed] itself to the need for law enforcement officers to protect themselves and other prospective victims of violence where they may lack probable cause for arrest.

Terry, 392 U.S. at 24. The Fourth Amendment emphatically does not require this. Nor does it require that "an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the

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8/ The Supreme Judicial Court noted that Officer Richardson testified that he was not "in fear while he was searching the truck" but did not utilize this factor in its analysis.

answer might be a bullet." Terry, 392 U.S. at 33.

B. The Courts Of Appeal Of The Various Circuits And The State Courts Are In Conflict Over Whether Facts Such As Those Presented Here Would Provide Reasonable Suspicion For A Terry Stop.

In 1981 three Justices of this Court, in dissenting from the denial of certiorari in White v. United States, 454 U.S. 924 (1981)[9/] stated that there was "conflict and confusion" in the state and federal courts over whether an anonymous tip may furnish reasonable suspicion for an investigatory stop. Id. at 925-926.

9/ The facts in White were similar to those in Couture. There, police received an anonymous call that a black man wearing a blue jumpsuit had entered a described car at a particular address and would be carrying drugs upon his return. Where police corroborated the information the D.C. Circuit held there was reasonable suspicion for a Terry stop. United States v. White, 648 F.2d 29 (D.C. Cir. 1981).

> While the determination of reasonable suspicion is heavily dependent on the specificity of the information, the amount of verification, and the urgency of a particular situation, the conflicting results cannot be explained as accounting for different factual patterns. Compare People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562 (1976) (anonymous call that black man in bar wearing red shirt had gun; no reasonable suspicion), with State v. Jernigan, 377 So.2d 1222 (La. 1979) (anonymous call that black man in bar wearing yellow shirt and blue pants had gun; reasonable suspicion), cert. denied, 446 U.S. 958 (1980). Also compare Jackson v. State, supra (anonymous call that man in car, precisely located, had gun; no reasonable suspicion), with People v. Taggart, supra (anonymous call that man on corner, precisely located, had gun; reasonable suspicion).

Id. at 926 n.2.

A number of the state cases cited and one federal case, United States v. Gorin, 564 F.2d 159 (4th Cir. 1977), present fact situations very similar, if not identical, to those of the present case. More recent cases disclose that there is

still conflict in the state and lower federal courts, and that the anonymity and/or reliability vel non of the informant is not the deciding factor. Rather, the crucial question is whether, even if what the reliable informant stated is true and particularized, there is enough to provide reasonable suspicion. As demonstrated below, while the D.C. Circuit, Fourth, Eleventh and, possibly, the First Circuits would have found reasonable suspicion to conduct an investigative detention in Couture, the Fifth Circuit would not have so found.

United States v. McClinnhan, 660 F.2d 500 (D.C. Cir. 1981), involved an anonymous call that a black man walking in a described location had a sawed-off shotgun in his briefcase. The D.C. Circuit Court of Appeals held that the stop and search was justified under Terry

and Adams, notwithstanding the fact that the existence of the gun was not verifiable until post-seizure, the stop and search was warranted given the danger to the public and the lack of other alternatives.

> Either they stopped McClinnhan on the basis of the tip as corroborated by their observation or they could at best follow him through the streets of Washington hoping he would commit a crime, or at least brandish the weapon. . . Either they ignored their reasonable suspicion or they took some action. We think that where their suspicion has some objective foundation, the Fourth Amendment does not, particularly where the reported contraband is as lethal as a sawed-off shotgun, require a police officer to ignore his well-founded doubts and . . . will permit an investigative detention.

McClinnhan, 660 F.2d at 503-503.

The Fourth Circuit has upheld a stop and frisk under facts nearly identical to those in Couture, United States v. Gorin, 564 F.2d 159 (4th Cir.) cert. denied, 434

U.S. 1080 (1978) (anonymous call that particularly described man with a gun was in bar although no other suspicious acivity; reasonable suspicion), and the Eleventh Circuit has also done so on facts much less compelling than the instant case. See United States v. Aldridge, 719 F.2d 368 (11th Cir. 1983) (officer receives information over radio that tenant in building nearby reported "suspicious persons in or around a construction site fooling with vehicles" and describing automobile; reasonable suspicion). The First Circuit has not ruled on precisely the facts presented here but has emphasized that the very purpose of a Terry stop is to search for weapons and that actual suspicion of weapons has been the crucial element in investigative detention cases. United

States v. Lott, 870 F.2d 778, 784 (1st Cir. 1989). Contra United States v. McLeroy, 584 F.2d 746 (5th Cir. 1978) (anonymous tip that man had shotgun in particularly described vehicle at a given address and police verified car, registration number and that address was McLeroy's; no reasonable suspicion because no information McLeroy involved in a crime).

The state courts are in similar conflict and disarray. Compare State v. Fayard, 537 So.2d 347 (La. App. Ct. 1988) (doorman in bar informs police officer that suspect had a gun under his shirt; reasonable suspicion to stop and frisk); State v. Jernigan, 377 So.2d 1222 (La. 1979), cert. denied, 446 U.S. 958 (1980) (anonymous call that black male wearing described clothing was sitting in a bar

with a gun; reasonable suspicion); Clark v. State, 171 Ind. App. 658, 358 N.E.2d 761 (1977) (hospital security guard calls police and reports two suspicious looking men in particularly described car have a gun; reasonable suspicion); and Johnson v. State, 439 A.2d 607 (Md. App. 1982) (unidentified citizen approaches police officer and tells him particularly described man in a restaurant had a gun; reasonable suspicion; with People v. Torres, 74 N.Y.2d 2201, 543 N.E.2d 61 (N.Y. 1989) (anonymous call that man wanted on homicide charges could be found in a particularly described business establishment, including physical description, type of car and clothing and fact that carrying a gun in a shoulder bag; no reasonable suspicion); People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562

(1976) (anonymous call that black man in bar wearing red shirt; no reasonable suspicion); and Jackson v. State, 157 Ind. App. 662, 301 N.E.2d 370 (1973) (anonymous caller that man in car, precisely located, had gun; no reasonable suspicion).

The foregoing demonstrates disarray and conflict in the federal and state courts on a fundamental issue which confronts thousands of police officers on a frequent basis. The effect of such uncertainty can only be deleterious to police officers charged with honoring constitutional guarantees as well as protecting the public and detecting and preventing crime.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts should be granted.

Respectfully submitted,

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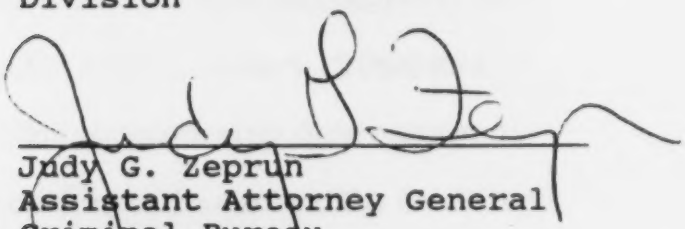
Attorney General

Paula J. DeGiacomo
Assistant Attorney General
Chief, Criminal Appellate Division



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1027J

(2)

90-228

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

PAUL R. COUTURE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

APPENDIX

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APPENDIX A

407 Mass. 178

COMMONWEALTH vs. PAUL R. COUTURE.

Middlesex.
December 6, 1989 - April 9, 1990.

Present: Liacos, C.J., Abrams, Nolan, O'Connor, & Greaney, JJ.

COMPLAINT received and sworn to in the Lowell Division of the District Court Department on February 12, 1988.

On appeal to the jury session, a pretrial motion to suppress evidence was heard by Neil J. Colicchio, J.

An application for an interlocutory appeal was allowed by Wilkins, J., in the Supreme Judicial Court for the county of Suffolk and the appeal was reported by him.

Cheryl A. Jacques, Assistant District Attorney, for the Commonwealth.

P. Scott Bratton for the defendant.

Robert Dowlut of the District Columbia & Karen L. MacNutt, for National Rifle Association of America, amicus curiae, submitted a brief.

LIACOS, C.J. The Commonwealth appeals from a judge's allowance of the defendant's motion to suppress a handgun which was uncovered during a warrantless search of the defendant's motor vehicle. A single justice of this court allowed the Commonwealth's application for interlocutory review and reported the case to the full court. We affirm the ruling of the motion judge.

The facts of the case, as found by the motion judge, are these. On February 11, 1988, a clerk at a convenience store in Lowell telephoned the local police and informed them that a man inside the store had a small handgun protruding from his right rear

pocket. The clerk said that the man entered a gray pickup truck with a New Hampshire registration number. The clerk reported the registration number to the police.

Officer Gary Richardson of the Lowell police department received a national park ranger's radio transmission stating that the ranger was following a truck which matched the clerk's description and which bore the reported registration number. Officer Richardson located and stopped the vehicle. He approached with his service revolver drawn, ordered the defendant, who was alone, out of the vehicle, and took him to the rear of the truck. As his partner detained the defendant, Officer Richardson searched the vehicle and found a small .38 caliber pistol which was three or four inches under the

front seat, near the transmission. Officer Richardson testified that he was not in fear for his safety at the time of the search. The officer advised the defendant of his rights and asked the defendant if he had a license for the gun. The defendant replied that he did not have a license.

The judge allowed the defendant's motion to suppress the firearm, citing Commonwealth v. Toole, 389 Mass. 159 (1983). We agree with the judge that this case is governed by Commonwealth v. Toole, supra.

In Toole, a State trooper lawfully stopped the defendant's vehicle and arrested the defendant on an outstanding arrest warrant. The police ordered Toole to leave the vehicle, and a subsequent "pat-frisk" revealed an empty holster and an ammunition clip

containing .45 caliber bullets. While Toole waited in handcuffs with two State troopers at the rear of the vehicle, another trooper searched the vehicle and found a .45 caliber gun behind the seat. After the search, Toole admitted that he did not have a firearm identification card. The troopers did not fear for their safety during the search. Toole was charged with unlawfully carrying a firearm under his control in a vehicle. A judge in the Greenfield District Court allowed Toole's motion to suppress evidence of the gun.

We affirmed, stating that probable cause did not exist at the time of the search:[1/]

1/ We also held in Toole that the search in that case could not be justified as a search incident to a lawful arrest. G.L. c. 276, §1 (1988 ed.).

"[I]t has not [been] shown that, when the search was conducted, the police reasonably believed that there was a connection between the vehicle and any criminal activity of the defendant, an essential element to a finding of probable cause. . . . The empty holster and ammunition found on the defendant certainly created probable cause to believe that there was a gun in the cab. But carrying a .45 caliber revolver is not necessarily a crime. A possible crime was carrying a gun without a license to carry firearms, G.L. c. 269, §10(a). However, the police did not learn that the defendant had no firearm identification card until after the search. They apparently never asked the defendant whether he had a license to carry a firearm. [There was an] absence of any showing that, before searching the vehicle, the police had probable cause to believe that there was contraband, an illegally carried weapon, in the cab. . . ." (Citation and footnote omitted; emphasis supplied.)

Commonwealth v. Toole, supra at 163-164.2/

In the case at hand, the judge's findings and the record make clear that the police had no probable cause to believe that the defendant was or had been engaged in any criminal activity. There is no evidence to suggest, and the Commonwealth does not claim, that the defendant was acting suspiciously when he was seen by the clerk at the convenience store. There is no indication that the gun which was seen was used in any manner to threaten or

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2/ We reaffirmed Toole's holding in Commonwealth v. Nowells, 390 Mass. 621, 627 (1983), when we stated: "The ownership or possession of a handgun (or a rifle) is not a crime and standing alone creates no probable cause." We noted in Commonwealth v. Rojas, 403 Mass. 483, 485 n.3 (1988), citing Nowells, that "possession of a handgun is not per se illegal."

intimidate the store clerk. There is no suggestion that the defendant lingered for an unusual period of time at the store or that he was "casing the joint" in preparation for a robbery. See Terry v. Ohio, 392 U.S. 1, 6 (1968). Rather, the police only knew that a man had been seen in public with a handgun. Under Toole, this unadorned fact, without any additional information suggesting criminal activity, does not give rise to probable cause. The police in this case had no reason to believe, before conducting the search of the vehicle, that the defendant had no license to carry a firearm. A police officer's knowledge that an individual is carrying a handgun, in and of itself, does not furnish probable cause to believe that the individual is illegally carrying that gun.

The Commonwealth argues that this conclusion conflicts with a body of law relating to G.L. c. 269, §10(a) (1988 ed.), the statute criminalizing the unlawful carrying of a firearm. We disagree. General Laws c. 269, §10(a), provides for the punishment of an individual who, "except as provided by law, carries on his person, or carries on his person under his control in a vehicle, a firearm, loaded or unloaded." The statute lists four exceptions to this general rule, two of which include "having in effect a license to carry firearms" issued under G.L. c. 140, §131 or §131F (1988 ed.).

In Commonwealth v. Jones, 372 Mass. 403 (1977), we discussed the elements required to prove a violation of G.L. c. 269, §10(a). In that case, the Commonwealth presented no evidence to

show that the defendant did not have a license to carry a firearm, and the defendant argued that there was error in the denial of his motion for a directed verdict and in the jury instructions on licensing. We affirmed the conviction for unlawfully carrying a firearm.

We stated in Jones, supra at 406:

> "The holding of a valid license brings the defendant within an exception to the general prohibition against carrying a firearm, and is an affirmative defense. . . . Absence of a license is not 'an element of the crime,' as that phrase is commonly used. In the absence of evidence with respect to a license, no issue is presented with respect to licensing. In other words, the burden is on the defendant to come forward with evidence of the defense. If such evidence is presented, however, the burden is on the prosecution to persuade the trier of facts beyond a reasonable doubt that the defense does not exist." (Citation

omitted.)[3]

The Commonwealth argues that Jones and Toole, read together, lead to an "irrational" result, namely, that a police officer in the street must show more in determining that a gun is unlawfully carried than a prosecutor needs to prove to obtain a conviction. This argument is based on a superficial reading of the standard set forth in the Jones case. Jones dealt with the allocation of burdens in the context of

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3/ Previously in the Jones opinion, supra at 405, we discussed the history and purpose of G.L. c. 278, §7 (1988 ed.), which provides in part: "A license . . . shall prove the same; and, until so proved, the presumption shall be that he is not so authorized."

We held that this statute did not create an unconstitutional presumption, because it did not shift to the defendant the burden of proof on an element of the crime. Id. at 409.

a criminal trial. The particular burden to which the quoted passage from Jones pertains is not the burden of proof, but merely the burden of coming forward with evidence sufficient to raise an issue of fact. See P.J. Liacos, Massachusetts Evidence 37 (5th ed. 1981 & Supp. 1985). Where the defendant at trial has had every opportunity to respond to the Commonwealth's charge that the defendant was unlawfully carrying a handgun, where the defendant need only produce that slip of paper indicating that he was licensed to carry that gun, and where instead the defendant produces no evidence to that effect, the jury are entitled to presume that the defendant indeed did not have a license to carry the gun, and the Commonwealth need present no additional evidence to prove that point. This scenario is a far cry

from a defendant who, having merely been seen in public with a handgun, and without any opportunity to respond as to whether he has a license, is forced out of his vehicle at gunpoint and subjected to an invasive search. The Jones standard does not make an open target of every individual who is lawfully carrying a handgun.

We briefly add that, while the motion judge did not address this issue, the Commonwealth is incorrect in its claim that the stop and subsequent search of the vehicle was justified under the principles of Terry v. Ohio, 392 U.S. 1 (1968). There is no question that the stop of the pickup truck constituted a seizure within the meaning of the Fourth Amendment to the United States Constitution. See United States v. Cortez, 449 U.S. 411, 417 (1981);

United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). "An investigatory stop must be justified by some objective manifestation tht the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, supra. As we discussed above, there is absolutely no indication that the defendant in this case was engaged in criminal activity. The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles.

The order of the motion judge is affirmed.

So ordered.

NOLAN, J. (dissenting). It is a crime to carry on one's person or under one's control in a vehicle a firearm without a license. G.L. c. 269, §10(a) (1988 ed.). Such a weapon is contraband and, therefore, subject to seizure. See Commonwealth v. Ortiz, 376 Mass. 349, 354 (1978).

The police officer received a report that the defendant was carrying a firearm and that he was operating a pickup truck. Apparently, when the defendant was searched outside his truck, he did not have a firearm on his person. Was there not, then, probable cause to believe that such weapon was in the defendant's truck? Clearly, the officer had a right to stop the defendant, order him out of the truck, and to "pat-frisk" him. Not finding the weapon on his person, it was not

unreasonable to search the truck. Even Commonwealth v. Toole, 389 Mass. 159 (1983), on which the court relies entirely, recognizes the propriety of a search of a vehicle for contraband. Id. at 164.

This is just another regrettable extension of the already regrettable exclusionary rule. I enthusiastically dissent.

APPENDIX B

SUPREME JUDICIAL OURT
FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

May 3, 1990

Michael Fabbri, A.D.A.
Cheryl A. Jacques, A.D.A.
James W. Sahakian, A.D.A.
MIDDLESEX COUNTY D.A.'s OFFICE
40 Thorndike Street
East Cambridge, MA 02141

Re: COMMONWEALTH vs. PAUL R. COUTURE Supreme Judicial Court No. SJC-5088

Dear Mr. Fabbri:

Your Petition for Rehearing in the above captioned appeal has been considered by the court and is denied.

Very truly yours,

Dolores G. Dupre
for Jean M. Kennett, Clerk

cc: Sheila Feiss, A.D.A.
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Lowell, MA 01852

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David B. Mark, A.D.A.
David Mark, Chief Appellate A.D.A.
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Pemberton Square
Court House - 6th Floor
Boston, MA 02108

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. DISTRICT COURT
DEPARTMENT
LOWELL DIVISION
JURY OF SIX SESSION
NO. 8811- J.C. 0401

COMMONWEALTH

vs.

PAUL R. COUTURE

FINDINGS AND RULINGS ON DEFENDANT'S MOTION TO SUPPRESS

On February 11, 1988 a clerk at the Li'l Peach store phoned the Lowell Police department and informed them that a man inside the store had a small handgun protruding from his right rear pocket. The man entered a gray pick-up truck with a New Hampshire registration, which the clerk gave to the police.

Later a national park ranger radioed that he was behind a truck fitting the description and bearing the registration number given by the clerk of the store. Officer Gary Richardson of the Lowell

Police department heard the transmission and stopped the vehicle.

Officer Richardson then went to the vehicle and searched and found a small 38 caliber pistol. The firearm was not in plain view. It was three or four inches under the front seat, near the transmission. The officer testified he was not in fear of his safety at the time of the search.

The officer then advised the defendant of his rights. He then asked the defendant if he had a license. The defendant replied that he didn't.

I rule the defendant's motion to suppress the firearm is allowed applying the reasoning of Comm. v. Toole, 389 Mass. 159 (1983).

Dated: Aug. 16, 1988

By the Court,

/s/

Neil Colicchio, Justice

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. LOWELL DISTRICT COURT
JURY OF SIX SESSION
NO. 8811-JC 0401

COMMONWEALTH

v.

PAUL R. COUTURE

TRANSCRIPT OF MOTION TO DISMISS
AND MOTION TO SUPPRESS

Christine Bannon, Assistant District
Attorney for the Commonwealth

P. Scott Bratton, Esquire
For the Defendant

Before: Colicchio, J.
Lowell District Court
July 11, 1988

DEF: Your honor I filed two motions in this case, both to be heard today. One is a Motion to Dismiss for loss of exculpatory evidence and the other is a Motion to Suppress, to suppress the weapon which was seized.

Court: This is on Couture.

DEF: That's right. For each of these motions I filed the motion with an Affidavit and Memorandum which the court has.

Court: Alright counsel.

DEF: Your honor, If I could be heard first on my motion to dismiss.

Court: Alright.

[ARGUMENT ON MOTION TO DISMISS OMITTED]

Court: What is the Motion to Suppress based on?

DEF: Your honor that motion is based on what I consider to have been an illegal seizure of a motor

vehicle and then a subsequent illegal search of the interior of the cab which yielded the gun. That's an entirely separate motion.

Court: I assume it is a separate motion, I just wanted to know what the basis was. I haven't read the whole thing your not raising the issue about the license not having a license.

DEF: No your honor my issue on the Motion to Suppress is that there was neither probable cause or reasonable suspicion of a crime to justify stopping the truck and that any following search was illegal.

Court: You're citing the Toole case.

DEF: Yes your honor. The way the license aspect comes into...if

I may... with respect to the Toole case, I believe this is a case that is nearly identical actually to my case. I'm sure the court is familiar with the Toole case. In this case there was also an issue of whether the defendant possessed the gun, possessed a license to carry. In this case....

Court: Since I'm going to give you a new date. I haven't read the thing thoroughly. Is it the Commonwealth's allegation that they ask the defendant whether or not he had a license or permit to carry before.

DEF: No. That did not happen until afterwards.

Court: Alright, you can have a new date.

D.A.: To hear both motions?

Court: Both of them, there's no sense in hearing one, we'll hear them both together.

DEF: Is it possible to have the Motion to Suppress...we have the officer hear he's been waiting.

Court: Alright.

D.A.: Commonwealth calls Gary Richardson. Would you please state your name and spell your last name for the record.

WIT: Gary Richardson.
R-i-c-h-a-r-d-s-o-n.

D.A.: Are you employed?

WIT: Yes, I am.

D.A.: Where are you employed?

WIT: By the Lowell Police Department.

D.A.: How long have you been so employed?

WIT: Nine (9) years.

D.A.: Were you on duty on February 11, 1988?

WIT: Yes I was.

D.A.: What duty were you assigned to?

WIT: I was assigned from the 5:00 P.M. to the 1:00 A.M. shift, car #3 Belvidere section of Lowell.

D.A.: Were you working alone or with another officer?

WIT: I was with another officer.

D.A.: Who was that officer?

WIT: Officer Steven Morril.

D.A.: At approximately 11:35 P.M. on February 11th did something happen that attracted your attention?

WIT: Yes.

D.A.: What happened?

WIT: I received a radio transmission from the communication center of the police station.

D.A.: Would you please relate to the court the subject matter of that radio communication.

WIT: The radio transmission stated that that there was a call from the Lil' Peach Store on Rogers Street from the clerk who stated that there was a man inside his store with a small handgun in his right rear pocket with a white pistol grip.

D.A.: And did you receive any other information in the radio communication?

WIT: Not at that particular time.

D.A.: Did you receive any information regarding a description of the vehicle?

WIT: Yes. Shortly thereafter I received information that the gentlemen had left in a green or grey Dodge Pickup truck with a New Hampshire registration.

D.A.: Did you receive any other information in this second communication?

WIT: Only that the direction of the truck had left in and the registration number, at that time.

D.A.: After you received this radio communication, what if anything did you do?

WIT: I headed towards the area of the Lil' Peach Store.

D.A.: And did something happen later regarding this radio communication?

WIT: Yes.

D.A.: What happened?

WIT: We received a radio communication from a National Park Ranger who stated that he was behind the motor vehicle that was described leaving the store.

D.A.: And was the license plate number on this motor vehicle the same as the one you had received in your earlier transmission as having left the Lil' Peach, with the man with the gun?

WIT: Yes, it was.

D.A.: As a result of the radio communication from the Park Ranger, what if anything did you do?

WIT: At that point we headed towards the Hunt Falls Bridge where the

Park Ranger had spotted the motor vehicle. As a result of that we pursued the motor vehicle to Reed Street, Centerville Section of Lowell, where we pulled it over.

D.A.: Did you activate your blue lights in this pursuit?

WIT: Yes, we did.

D.A.: Where did you pull the vehicle over?

WIT: On Reed Street.

D.A.: And who was present at the scene when you pulled the vehicle over?

WIT: Myself, the Park Ranger and Sgt. Deward who was in another patrol car.

D.A.: And after you arrived at the scene, what if anything did you do?

WIT: We approached the vehicle and took the operator of the motor vehicle from the motor vehicle.

D.A.: How many people were there in the motor vehicle at the time you stopped it?

WIT: One (1).

D.A.: And is the person that was in the motor vehicle in the courtroom today?

WIT: Yes he is.

D.A.: Would you please point to that person and describe what he is wearing for the record.

WIT: The gentleman right here with the red hair in the three piece blue suit.

D.A.: Your honor may the record reflect that he has identified the defendant, Paul Couture.

D.A.: When you approached the vehicle, what exactly happened?

WIT: When I approached the motor vehicle, I went to the driver's side door, with my service revolver out and I ordered the defendant from the motor vehicle.

D.A.: And what if anything did you do next?

WIT: At that point we took him right to the back where the cab, or rear of the truck is.

D.A.: And did you at that time have any conversation with the defendant?

WIT: Not at that point. I just asked him for some identification, that was the extent of it.

D.A.: And what did you do next?

WIT: At that point I have Officer Morril detain the defendant at the rear of the truck and we checked the passenger area of the cab of the pickup truck.

D.A.: And in your check of the passenger's area of the pickup truck, did you find anything?

WIT: Yes we did.

D.A.: What did you find?

WIT: We found a small 38 caliber Derringer with a white pistol grip, as described by the clerk at the store as being in the motor, as being in the man's possession.

Court: Where did you find it Officer?

WIT: It was on the floor on that, like the hump where the transmission goes your honor,

just about three of four inches under the seat.

D.A.: And did the gun that you found match the description that you heard from the radio communication as being the gun that was in the Lil' Peach Store earlier?

WIT: Yes it did.

D.A.: After you discovered the hand gun what if anything did you do?

WIT: At that time, I examined the gun to check to see if it was loaded. I removed the rounds from it at that time and then I went and spoke with the defendant.

D.A.: And what conversation, if any, did you have, with the defendant?

WIT: I advised him of his rights, per miranda, and at that time I asked him if he had a license to carry a handgun.

D.A.: And did he respond to that question?

WIT: Yes he did.

D.A.: What was his response?

WIT: He said he had no license to carry a handgun.

D.A.: Based on that information, what if anything did you do?

WIT: The defendant was placed under arrest and transported to the station via wagon, the handgun was tagged as evidence and sent to 1010 Commonwealth Avenue for a ballistics check.

D.A.: Was possession of a firearm the only count Mr. Couture was charged with at that time?

WIT: That's correct.

D.A.: May I have one moment your honor? Did you bring the gun with you today?

WIT: No I didn't.

D.A.: Your honor, it should have been a preliminary matter, but defense counsel and I have stipulated that for purposes of this motion, that the gun in question was a fire arm under Chapter 140 Section 121. The gun is not available today.

DEF: That's correct your honor.

D.A.: Officer Richardson when you found the handgun, would you please describe exactly where it was in relation to whether it was more towards the passenger's side or the driver's side of the front cab?

WIT: It was more towards the driver's side, I would say that it was on the side of the hump, as I said it allows the drive shaft transmission to go to the engine, probably like 3 inches down the side of the hump.

D.A.: It was more towards the driver's side then the passenger's side, is that your testimony?

WIT: Yes it was.

D.A.: No further questions.

Cross-examination of Officer Richardson by Defendant

DEF: A few brief questions your honor. Now officer when you received the radio transmission, were you the

first officer responding to the Lil' Peach Store?

WIT: I never responded to the store. Another cruiser went and gave us the further information.

DEF: Is it fair to say that neither men committed a crime at the Lil' Peach?

D.A.: Objection.

Court: No.

DEF: Is it fair to say that neither men committed a crime at Lil' Peach?

WIT: I wasn't at Lil' Peach.

DEF: Based on the information you had, is it fair to say you were not investigation a shoplifting case?

WIT: That's correct.

DEF: Then is it fair to say that you were not investigation an

attempted robbery case?

WIT: At that point in time we didn't have that information as far as a robbery.

DEF: But it's fair to say that the only thing which my client was charged with was possession of the gun, correct?

WIT: That's correct?

DEF: And why were you trying to pull him over that night?

WIT: Based on the information that we received from the radio.

DEF: Which was that?

WIT: That a man had left the store with a gun, they gave a description of the truck and the plate.

DEF: Now if one possesses a handgun with a license it is not

illegal to possess a handgun, correct?

WIT: That's correct.

DEF: And until you asked my client after the search, you had no knowledge that he did not possess a license, to carry.

WIT: That's correct.

DEF: So is it fair to say that prior to pulling the truck over you had no evidence that he had committed any crime?

WIT: No I didn't.

DEF: Now the truck was not pulled over for any motor vehicle violations, is that correct?

WIT: That's correct.

DEF: So you pulled him over because you suspected that neither man had a license to carry, is that fair to say?

WIT: No that's not.

DEF: Why then was he pulled over?

WIT: As a result of the radio transmission, a man was in a store with a gun in his back pocket, I felt that there may have been a crime committed.

DEF: But from the information you had, in fact there was no crime committed, is that right?

WIT: At that point in time.

DEF: Now when you searched the truck, the gun was found three or four inches under the front seat?

WIT: That's correct.

DEF: And when you were searching the truck, my client was at the rear of the truck.

WIT: That's correct, about half way down the side.

DEF: Okay. And you were with Officer Morril and Officer Duarte.

WIT: That's correct.

DEF: And when you were searching the truck, do you know if he was handcuffed yet?

WIT: No, he wasn't.

DEF: Do you know if the other officers had their service revolvers drawn on him?

WIT: Not at that point, no.

DEF: Did you fear that he might try to escape?

WIT: No.

DEF: I have no further questions...I have just one more question?

DEF: Did you fear for your safety while you were searching the cab of the truck?

WIT: No.

DEF: No further questions.

D.A.: I just have a couple of quick questions. Officer the location that you found the gun in, was that an area that the defendant would have access to...

DEF: Objection.

Court: She hasn't finished her question.

D.A.: Would that be an area in which the defendant in operating the vehicle would have access to as the driver of the vehicle?

WIT: Absolutely.

DEF: Objection, motion to strike.

Court: No.

D.A.: No further questions your honor.

DEF: Nothing further your honor.

D.A.: That's the Commonwealth's case your honor.

DEF: May I be heard in arguments your honor?

Court: I'll take, before we hear arguments, Madame D.A., do you feel that Toole case has to be distinguished here.

D.A.: Excuse me, the Toole case?

Court: Are you familiar with it?

D.A.: Yes I am your honor. I feel it is distinguished because the reason that this particular defendant was stopped was because of the firearm, the police had reasonable belief when they stopped the vehicle to believe that the defendant was possessing a firearm.

Court: What did Toole talk about.

D.A.: That talks about a person being stopped and that they felt that the firearm could be on it.

Court: What are they talking about legally speaking, never mind factually speaking. What are they saying legally speaking? I'm going to do this, I'm going to give you an opportunity to file a Memorandum in response to the defendant's memo. I would suggest that you absolutely zero in on the Toole case and decide whether or not it has to be distinguished, and if it does have to be, inform the court how you distinguish it.

D.A.: Thank you your honor.

DEF: Your honor may I ask that on the second motion date, will I be able to make argument on the Motion to Dismiss in response

to the Commonwealth's Memorandum.

Court: Would you be able to argue the Motion to Dismiss?

DEF: Suppress.

Court: Of course, she's going to give us a Memo.

DEF: Alright. So there won't be any further argument on this.

Court: Well let's not say that we won't have an argument at the moment, I want the district attorney to determine if she feels the Toole case has to be distinguished and how she distinguishes it.

DEF: Okay, so am I correct in understanding that after the Memorandum is submitted you will decide the case without further argument.

Court: Oh no, no no. That's the day I'm going to listen to argument, you see I haven't heard argument yet on it.

DEF: Oh I see.

Court: I want her to look over it and see whether or not it has to be distinguished and if she says yes and she says this is how it is, then I will expect you to respond, orally.

DEF: Thank you your honor.

(3)

No. 90-228.

In the

Supreme Court of the United States.

OCTOBER TERM, 1990.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

PAUL R. COUTURE,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

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August 30, 1990

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether the Fourth Amendment prohibits the police from conducting an investigative stop of a motor vehicle where the sole information is that its occupant is carrying a handgun.

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Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

Respondent, Paul R. Couture, respectfully opposes the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts filed by petitioner, Commonwealth of Massachusetts.

REASONS WHY A WRIT SHOULD NOT BE GRANTED.

I. Introduction.

Rule 17 of the Rules of the Supreme Court states that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. Rule 17 goes on to enumerate several reasons, not exclusive, for which this Court will grant a writ of certiorari. Only two of those reasons could conceivably apply to the instant case: (1) an important and unsettled question of federal law, Sup. Ct. R. 17.1(c); or a conflict with applicable decisions of the Supreme Court. Sup. Ct. R. 17.1(c). Since the instant case is distinguishable on it facts from prior decisions of this Court and is consistent with those decisions the petitioner has failed to meet the standard for granting certiorari under Rule 17.

II. The Court Should Not Grant a Writ as the Decision Below is Not in Conflict with Decisions of This Court Since It Is Distinguishable on its Facts.

The primary argument advanced by the Commonwealth of Massachusetts for granting a writ is that the decision in *Commonwealth* v. *Couture*, 407 Mass. 178 (1990) is in conflict with the decisions of this Court in *Terry* v. *Ohio*, 392 U.S. 1 (1968), *Adams* v. *Williams*, 407 U.S. 143 (1972), and *Michigan* v. *Long*, 463 U.S. 1032 (1983). Upon closer scrutiny of those decisions, it is clear that the Commonwealth's argument is misguided since *Couture* is distinguishable on its facts and is thereby consistent with those cases.

The holding of this Court in *Terry* v. *Ohio*, 392 U.S. 1 (1968) was narrow:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Terry v. *Ohio*, 392 U.S. 1, 30-31.

The *Terry* Court turned its "attention to the quite narrow question posed by the facts before [it]: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest." 392 U.S. at 15. In determining whether the seizure and search in *Terry* was reasonable under the Fourth Amendment the "inquiry was a dual one — whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. In "justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant that intrusion." *Id.* at 21.

In *Terry*, while patrolling downtown Cleveland at 2:30 P.M., the officer's attention was drawn to two men he suspected of "casing a job" due to their walking past a storefront approximately twelve times during a ten to twelve minute period. *Id.* at 5-6. He also feared they may have had a gun. *Id.* at 6. The activities of "casing" the store for a robbery, were "specific and articulable facts" which justified the officer's actions at their inception and the officer concluded reasonably that "criminal activity was afoot." *Terry* v. *Ohio*, 392 U.S. at 23.

In *Couture*, the Supreme Judicial Court noted "there is absolutely no indication that the defendant in this case was engaged in criminal activity. The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles." *Commonwealth* v. *Couture*, 407 Mass. at 183. At the suppression hearing, Officer Gary Richardson of the Lowell Police Department testified that the only reason he stopped respondent's vehicle was that a man had left the store with a gun (A. 39). The officer further testified that prior to stopping the truck he had no evidence that respondent had committed a crime (A. 40). He was not stopped for motor vehicle violations (A. 40). Officer Richardson testified that he did not suspect respondent of shoplifting or attempted robbery at the store prior to stopping the truck (A. 38-39). It is evident the only crime for which the officer was seizing respondent's motor vehicle was possibly carrying a firearm without a license in violation of Mass. Gen. Laws c. 269, § 10. It was not until the vehicle had been stopped and searched that the officer inquired as to whether respondent had a gun license, hence, at the time of the initial stop of the vehicle he had no knowledge respondent did not possess a license to carry a firearm (A. 10). The Commonwealth embellishes the facts of *Couture* by stating the store clerk was in fear and suspected respondent of "casing"

the store and that respondent "did not immediately pull over" for the police (Petition 27, 30). Those allegations are not supported by the record of this case.

Since the record indicates that the police had no information to believe respondent was engaged in criminal activity prior to seizing his vehicle, the question becomes whether the mere possession of a handgun in a public place is "unusual conduct which leads [the officer] reasonably to conclude in light of his experience that criminal activity may be afoot," *Terry* v. *Ohio*, 392 U.S. 1, 30-31 (1968), thus justifying the officer's actions in stopping the vehicle "at their inception." 392 U.S. at 20.

Couture and *Terry* are distinguishable since *Terry* involved a brief street encounter between the officer and suspect, *Terry* v. *Ohio*, 392 U.S. at 5, while respondent was stopped when driving a truck. *Commonwealth* v. *Couture*, 407 Mass. at 179. Had respondent been observed carrying a firearm by the officer during a street encounter, it would seem reasonable under the Fourth Amendment for the officer to conduct a *Terry* stop to inquire with respect to a gun license. However, it is another matter for the government to have the power to stop a moving automobile and conduct a search based solely upon the belief that the suspect earlier possessed a handgun, since one has a greater expectation of privacy while travelling in an automobile than during a street encounter. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461-462.

The Commonwealth of Massachusetts asks this Court to create a rule which would allow a police officer to operate with the presumption that mere possession of a firearm is evidence that "criminal activity is afoot." See *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). A presumption that firearms are inherently illegal is inconsistent with the Second Amendment to the Constitution of the United States which provides "A well regulated militia,

being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." U.S. Const. Amend. II. Such a presumption is also contrary to Article XVII of the Declaration of Rights of the Massachusetts Constitution which provides in part "the people have a right to keep and to bear arms for the common defence." Mass. Const., Part 1, Art. XVII. A constitution is not intended to provide merely for the exigencies of a few years, but is to endure through a long lapse of ages. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

The Commonwealth also contends that *Couture* contradicts this Court's holdings in *Adams* v. *Williams*, 407 U.S. 143 (1972) and *Michigan* v. *Long*, 463 U.S. 1032 (1983). *Adams* is distinguishable from *Couture* since in *Adams* a person approached a police officer in a high crime area at 2:15 A.M. and informed him that an individual seated in a nearby vehicle was carrying *narcotics* and had a gun at his waist. *Adams* v. *Williams*, 407 U.S. at 144-145 (1972) (emphasis added). While the primary focus of the Court's opinion in *Adams* was on the reliability of the informant's tip, 407 U.S. at 147, the initial encounter was proper since the officer was investigating a violation of the narcotics laws.

Also different on its facts from *Couture* is *Michigan* v. *Long*, 463 U.S. 1032 (1983) in which two police officers patrolling a rural area at night observed a car travelling erratically and at excessive speed. *Id.* at 1035. The officers observed the car turning down a side road where it swerved into a ditch. *Id.* at 1035. The officers approached and observed the suspect and thought he was under the influence of something. *Id.* at 1036. They observed a large hunting knife on the floorboard of the driver's side of the car and also saw a bag of marijuana in plain view protruding from the armrest of the front seat. *Michigan* v. *Long*, 463 U.S. at 1036. A subsequent search of the trunk of the vehicle revealed seventy-five pounds of mari-

juana. *Id.* at 1036. In extending the stop and frisk principles of *Terry* to automobiles, the court in *Michigan* v. *Long* held "the *search* of the passenger compartment of an automobile . . . is permissible if the police officer possesses a reasonable belief based on specific and articulable facts . . . that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049 (emphasis supplied).

In *Long*, the Court did not address the issue of what constitutes reasonable suspicion of criminal activity to justify the initial *stop* of the vehicle. In *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the Court rejected the theory that there was a distinction between the power to seize a vehicle and the power to subsequently search the vehicle. 399 U.S. at 51-52. (See also *United States* v. *Ross*, 456 U.S. 798 (1982)). Beginning with the Court's decision in *Carroll* v. *United States*, 267 U.S. 132 (1925), the rule has been that there must be probable cause and exigent circumstances to initially stop an automobile. *Carroll* v. *United States*, 267 U.S. at 156. The Court in *Michigan* v. *Long*, 463 U.S. 1032 (1983), dealt with the situation where the initial intrusion into the area of privacy was based upon probable cause and the subsequent search was conducted pursuant to *Terry*. *Michigan* v. *Long*, 463 U.S. at 1037.

In both *Adams* v. *Williams*, 407 U.S. 143 (1972) and *Michigan* v. *Long*, 463 U.S. 1032 (1983), there were facts suggesting criminal activity which justified the seizure of the suspect; in *Adams* the officer had reliable information that the suspect illegally possessed narcotics and in *Michigan* v. *Long*, the officers had probable cause to stop the defendant for motor vehicle violations and to approach him once the car went into the ditch. As in *Terry*, neither of those cases involved a situation where the police initially stopped the suspect based upon the sole fact that the defendant possessed a firearm. The facts of *Couture* are clearly distinguishable from the prior decisions of this Court and *Couture* is not in conflict with *Terry* v. *Ohio*,

392 U.S. 1 (1968), *Adams* v. *Williams*, 402 U.S. 143 (1972) and *Michigan* v. *Long*, 463 U.S. 1032 (1983).

III. The Petition Should Be Denied Since It Does Not Address the Issue of Probable Cause to Search the Vehicle, Which the Supreme Judicial Court Decided on Independent State Grounds.

The Commonwealth concedes that the "petition only addresses the reasonable suspicion argument." (Petition 10, n.2.)

Assuming *arguendo* that the initial stop of the vehicle was supported by reasonable suspicion, the Commonwealth does not address the issue of whether there existed probable cause to search respondent and his vehicle. The Supreme Judicial Court held in *Commonwealth* v. *Couture*, 407 Mass. 178 (1990) that "[t]he police in this case had no reason to believe, before conducting the search of the vehicle, that the defendant had no license to carry a firearm." 407 Mass. at 181. "A police officer's knowledge that an individual is carrying a handgun, in and of itself, does not furnish probable cause to believe that the individual is illegally carrying that gun." *Id.* at 181. Article XIV of the Declaration of Rights of the Massachusetts Constitution provides in part "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." Mass. Const. Part 1, Art. XIV. Even if the Court should agree that the level of information available to the officer in the instant case justified the seizure of the vehicle under the Fourth Amendment, the subsequent search was found to be unreasonable under the Massachusetts Constitution. *Commonwealth* v. *Couture*, 407 Mass. 178 (1990).

The Commonwealth's petition thus becomes moot since in the event the Court decides the initial stop was reasonable under

the Fourth Amendment, the gun must still be suppressed as evidence at trial since the subsequent search was unreasonable under the Massachusetts Constitution.

Conclusion.

For the foregoing reasons, the respondent respectfully requests this Court to deny the petitioner a writ of certiorari in this case.

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